

(2)  
No. 89-929



In The  
**Supreme Court of the United States**  
October 1989 Term

—◆—  
ULYSSES ABBOTT,  
TYREE BIGGS, *et al.*,

*Petitioners,*

vs.

GOULD INC.,

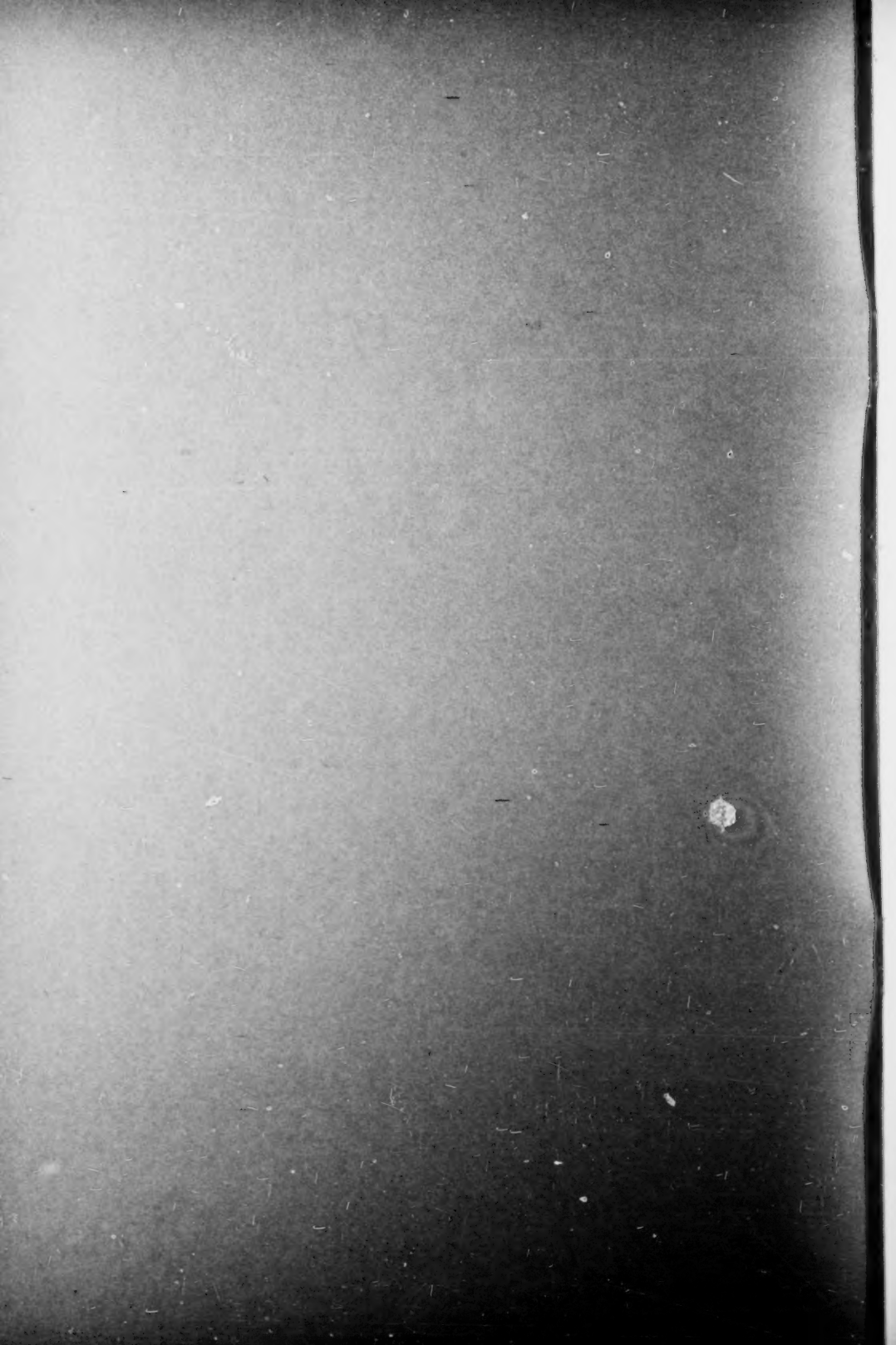
*Respondent.*

—◆—  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEBRASKA

—◆—  
BRIEF OF RESPONDENT IN RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI

—◆—  
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## QUESTION PRESENTED FOR REVIEW

The question which Petitioners present for review is whether the exclusive remedy provision of Nebraska's Workers' Compensation Act violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, particularly where Petitioners have alleged intentional tortious activity by their employer, Respondent Gould Inc. (hereinafter "Gould").

## PARTIES

Gould accepts Petitioners' listing of parties in the Petition for Writ of Certiorari.<sup>1</sup>

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<sup>1</sup> In compliance with Rule 28.1 of the Supreme Court of the United States, Gould submits the following listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Gould: Nippon Mining U.S. Inc. (parent), Barnes-Sightmaster Ltd. (Rhode Island) (affiliate), and Clevite de Mexico, S.A. de C.V. (Mexico) (affiliate).

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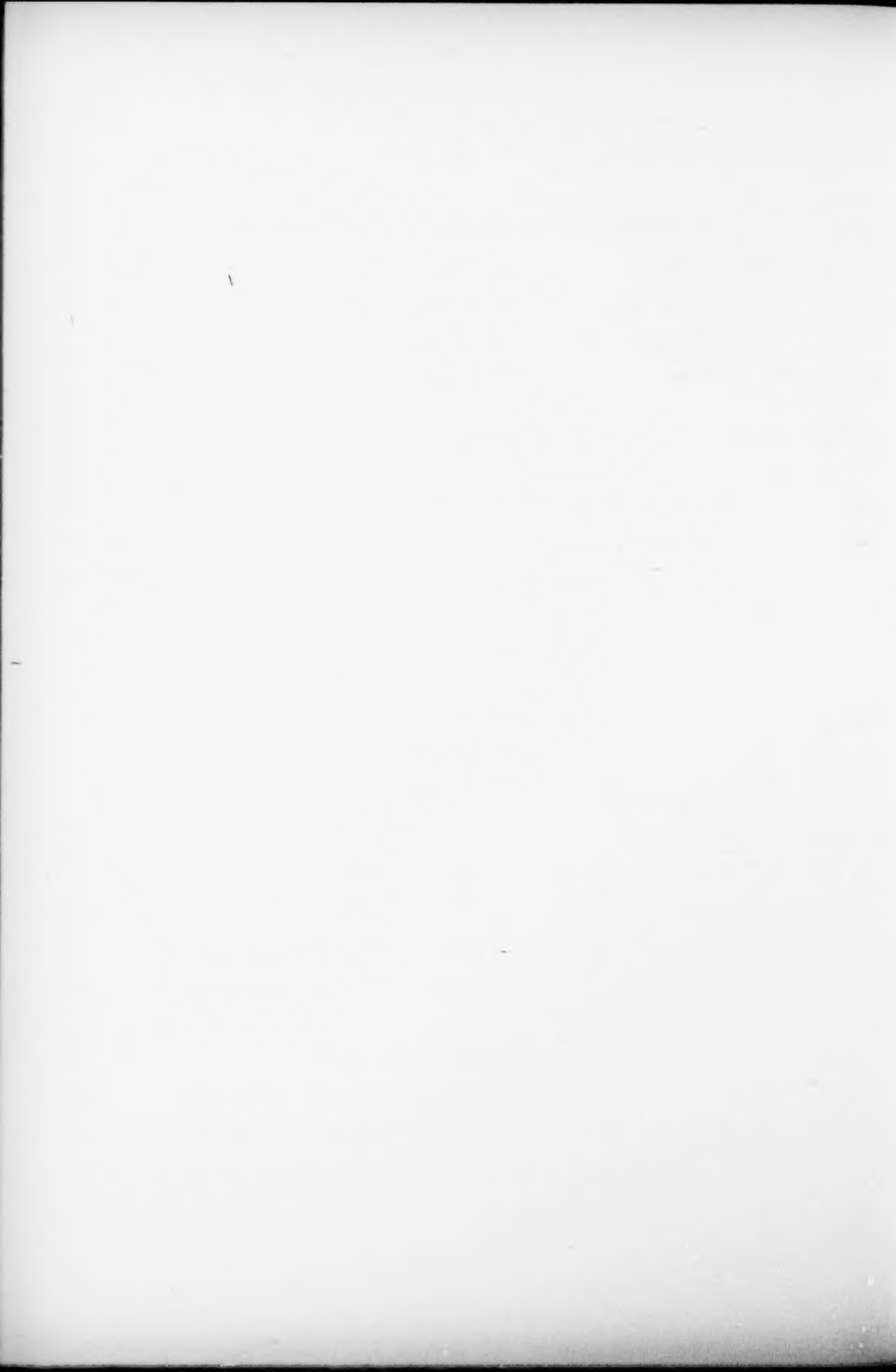


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## CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURT BELOW

In an unreported decision, the trial court (District Court of Douglas County, Nebraska) sustained Gould's Demurrer to Petitioners' consolidated Petitions on September 8, 1987. In sustaining the Demurrer, the district court dismissed all Petitions with prejudice.

On July 21, 1989, the Supreme Court of Nebraska unanimously affirmed the decision of the district court. This decision is reported in *Abbott v. Gould Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989).

On October 4, 1989, in an unreported decision, the Supreme Court of Nebraska overruled Petitioners' motion for rehearing.

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## STATEMENT OF JURISDICTION

For the reasons stated in its argument which follows, Gould does not believe the constitutional argument raised by Petitioners in the Petition for Writ of Certiorari was properly raised or preserved in the proceedings below. Without waiving this contention, Gould acknowledges Petitioners' jurisdictional statement in the Petition for Writ of Certiorari.

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## CONSTITUTIONAL PROVISIONS AND STATUTES

Gould accepts the constitutional provisions and statutes as set out in the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Petitioners (former employees of Gould, or in some instances, the personal representatives of former employees) filed this common law action in the District Court of Douglas County, Nebraska, alleging that they were "intentionally" injured by Gould as a result of various exposures to lead and other allegedly toxic substances during the scope of their employment at the Gould secondary smelting plant in Omaha, Nebraska.

Numerous separate lawsuits were originally filed, naming two physicians as defendants along with Gould. Pursuant to a court order granting leave to do so, Petitioners filed a Master Long Form Petition, setting forth theories of recovery and allegations of liability. Short Form Petitions (according to each Petitioner's status as single or married) were filed for each individual Petitioner. Nowhere in either the Long Form or Short Form Petitions (collectively "the Petitions") did Petitioners make mention of any constitutional issue.

Gould demurred to the Petitions on the basis that the District Court of Douglas County, Nebraska lacked subject matter jurisdiction of Petitioners' cases because the exclusive remedy, if any, for Petitioners' injuries fell within the ambit of the Nebraska Workers' Compensation Act. Gould's Demurrer was sustained by the district court. On appeal, the decision of the trial court was affirmed by the Nebraska Supreme Court on the grounds of the exclusive remedy provision.

Petitioners did not raise the argument of unconstitutionality at the trial level. Constitutionality did not become an issue in this case until the matter was on

appeal to the Nebraska Supreme Court. Even then, at oral argument before the Nebraska Supreme Court, counsel for Petitioners chose not to argue the constitutional issues raised in their Pre-hearing Conference Statement and brief (i.e., involuntary servitude, denial of access to courts, and due process violations). Despite Petitioners' lack of oral argument on the issues, the Nebraska Supreme Court noted in dictum that the constitutional arguments as raised in Petitioners' brief were without merit. 232 Neb. at 915, 43 N.W.2d at 596. In their pending Petition for Writ of Certiorari, Petitioners allege a violation of their due process rights under the Fourteenth Amendment.

The foregoing Statement of the Case is complete and is supported by the record. Gould takes exception to those extraneous portions of Petitioners' Statement of the Case which are either 1) irrelevant and hyperbolic or 2) conclusory and unsupported by the record, and, in some instances, both.

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### SUMMARY OF ARGUMENT

Objections to the constitutionality of a statute must be raised at the earliest possible opportunity. Petitioners' failure to contest the constitutionality of Nebraska's Workers' Compensation Act at the trial level precludes them from raising the issue now.

Even if Petitioners' failure to conform to recognized principles of constitutional advocacy is ignored, their Petition for Writ of Certiorari should be denied because of the lack of a compelling question of federal law.

Workers' compensation legislation has repeatedly been upheld on due process grounds. While in some instances workers might prefer to have access to common law recovery, their preference does not give rise to a claim of unconstitutionality. The wisdom of the legislative determination cannot be attacked on due process grounds where no vested right has been disturbed and a reasonable substitute remedy has been provided.

The facts in the instant case do not reflect an intent to injure workers. Allegations of intentionally tortious conduct, even if true, do not support a claim of due process violation. The workers' compensation remedy remains the exclusive remedy.

The instant case is clearly distinguishable from *Barrett v. Adams Fruit Co.*, 867 F.2d 1305 (11th Cir.), cert. granted, 110 S. Ct. 49 (1989) (No. 88-2035). *Barrett* involves a conflict between a state's workers' compensation legislation and a federal statute designed to protect seasonal agricultural workers. The case calls into issue the Supremacy Clause. *Barrett* also presents a direct conflict with a recent decision by the Fourth Circuit Court of Appeals. Due to the vast dissimilarities between *Barrett* and the instant case, it would be inappropriate to grant certiorari in this case as a "companion case" to *Barrett*, as suggested by Petitioners' counsel.

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## ARGUMENT

## I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS FAILED TO TIMELY AND PROPERLY RAISE THE PURPORTED FEDERAL QUESTION.

Rule 21(h) of the Supreme Court of the United States, which discusses the required contents of a petition for certiorari, provides:

If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both *in the court of first instance* and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . *as will show that the federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.*

(emphasis supplied).

The only reference which Petitioners make to the constitutional issue being raised below appears on page 9 of their Petition for Writ of Certiorari. Petitioners allege that at the district court hearing on Gould's Demurrer, "plaintiffs raised federal constitutional objections including that of due process." Gould does not recall that any such objections were raised during oral argument in the

district court. The first notice Gould had of any constitutional objections was when it received Petitioners' Pre-hearing Conference Statement during the appeal to the Nebraska Supreme Court. The district court did not rule on any constitutional issues, and the state supreme court considered those issues only gratuitously after Petitioners' counsel chose to waive oral argument on them before the supreme court.

Under the clear precedent of this Court, only the constitutional issues which were raised in the lower courts are before the Supreme Court on appeal. *Shelley v. Kraemer*, 334 U.S. 1, 8-9 (1948). Federal appellate procedure has consistently required that any constitutional objections be raised at the earliest possible opportunity. See *Allen v. Beneficial Finance Co.*, 531 F.2d 797, 805 (7th Cir.), cert. denied, 429 U.S. 885 (1976) (issue as to constitutionality of requirement under Truth in Lending Act would not be considered on appeal where lender failed to properly raise the issue in the trial court); *Gardner v. Meyers*, 491 F.2d 1184, 1190 (8th Cir. 1974) (contention that Nebraska guest statute denied equal protection would not be considered for first time on appeal); see also *In re Black Ranches, Inc.*, 362 F.2d 19, 32 (8th Cir.), cert. denied sub nom. *Black v. Brando*, 385 U.S. 990 (1966) (on appeal the appealing party must adhere to theory on which case was tried in lower court).

Petitioners having wholly failed to raise the due process issue in their pleadings, briefs or arguments in the district court, are not at liberty to raise the issue now in their Petition for Writ of Certiorari. This Court therefore lacks jurisdiction to review the judgment of the Nebraska



Supreme Court on writ of certiorari and the Petition for Writ should be denied on these grounds.

## II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO SPECIAL OR IMPORTANT REASONS IN ACCORDANCE WITH THE SUPREME COURT RULES GOVERNING REVIEW ON CERTIORARI WHICH JUSTIFY A GRANT OF CERTIORARI.

Even if Petitioners' failure to timely and properly raise the constitutional issue below is disregarded, their Petition for Writ should still be denied since there are no compelling reasons for granting certiorari. Rule 17 of the Supreme Court Rules notes that review on writ of certiorari is a matter of judicial discretion, and indicates the character of reasons that will be considered in determining whether to grant certiorari. Among these reasons is the situation where a state court has "decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17.1(c).<sup>2</sup>

It is doubtful whether the Nebraska Supreme Court even decided a question of federal law. In its nine-page opinion, the Nebraska Supreme Court stated as follows

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<sup>2</sup> No contention is apparently made by Petitioners that the reasons under either Rule 17.1(a) or 17.1(b) are applicable in this case.

with respect to Petitioners' claimed violation of due process rights under the Fourteenth Amendment to the U.S. Constitution:

Plaintiffs' remaining constitutional arguments are resolved by noting that they have a remedy under the Workers' Compensation Act for all personal injuries proved to have been caused by an occupational disease arising out of and in the course of their employment with Gould, including both the initial effects caused by the work environment and any subsequent exacerbations of the same.

*Abbott v. Gould Inc.*, 232 Neb. at 915, 443 N.W.2d at 596. The court's minimal treatment of the due process issue no doubt reflects Petitioners' scant presentation on appeal of the constitutional issues. The supreme court's brief paragraph on the due process and other constitutional issues is, at best, dictum and can fairly be viewed as something less than a decision on "an important question of federal law."

Even assuming for the sake of argument that the Nebraska Supreme Court did decide the due process issue, the same issue has been decided by this Court, and the Nebraska Supreme Court's holding is consistent with the decisions of this Court.

**A. THE CONSTITUTIONALITY OF THE EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION ACTS HAS CONSISTENTLY BEEN UPHOLD BY THIS AND OTHER FEDERAL COURTS AGAINST DUE PROCESS ATTACKS.**

The trilogy of cases decided by this Court in 1917 decided the constitutionality of New York's, Iowa's, and

Washington's Workmen's Compensation Acts.<sup>3</sup> Although the claims of unconstitutionality were made by the employers (who claimed that imposing liability without regard to fault deprived them of their property without due process of law), the Court acknowledged that it was necessary to view the constitutional question "from the standpoint of the employee as well as from that of the employer." *New York Central R.R.*, 243 U.S. at 197 ("the statute if invalid as against the employee is invalid as against the employer"). Relying in part on *Munn v. Illinois*, 94 U.S. 113 (1876), a seminal due process case, the Court in *New York Central R.R.* stated:

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.

243 U.S. at 197-98 (citations omitted). The Court went on to describe the *quid pro quo* which justifies the compensation scheme and fulfills the due process requirements:

The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases

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<sup>3</sup> *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary.

\* \* \*

The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State . . . .

243 U.S. at 201-02. The *quid pro quo* described by this Court in *New York Central R.R.* obviously provided the basis for the Nebraska Supreme Court's holding below in the instant case. The cornerstone of the *quid pro quo*, from the employer's perspective, is the exclusive remedy provision. *Johnston v. State*, 219 Neb. 457, 464, 364 N.W.2d 1, 6 (1985) ("*the history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the key-stone was the exclusiveness of the remedy.*") (emphasis in original).

The Court in *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919) again upheld the constitutionality of workers' compensation legislation against due process attack. The Court held that rules of common law

are not placed, by the Fourteenth Amendment, beyond the reach of the State's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in defiance of natural justice, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.

250 U.S. at 421-22.

In *Middleton v. Texas Power & Light Co.*, 249 U.S. 152 (1919), the employee appealed, alleging that the Texas Employers' Liability Act violated the due process provision of the Fourteenth Amendment. The Court upheld the Act, including the exclusive remedy aspect of it, noting that

as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest.

249 U.S. at 163.

The reasoning of these early pronouncements on the constitutionality of workers' compensation legislation remains sound and has been followed by numerous lower federal courts. See, e.g., *King v. Williams Industries, Inc.*,

724 F.2d 240, 242 (1st Cir.), *cert. denied*, 466 U.S. 980 (1984) (relying on *New York Central R.R.* to uphold exclusive remedy provision of Indiana compensation act); *Keller v. Dravo Corp.*, 441 F.2d 1239, 1242 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972) (upholding exclusive remedy provision of Longshoremen's Act in part on basis of *New York Central R.R.* and stating that abolition of non-vested rights is especially innocuous if one remedy is substituted for another); *Kazoski v. Consolidation Coal Co.*, 368 F. Supp. 1022, 1024 (W.D. Pa.), *aff'd*, 506 F.2d 1051 (3d Cir. 1974) (holding that trade-off between employers and employees supports constitutionality of West Virginia's compensation act); *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668, 676 (S.D. Ga. 1973) (holding concept of exclusiveness of remedy in Georgia compensation act to be a rational mechanism for making the compensation system work in accord with the purpose of the Act) (citation omitted).

Petitioners in the instant case argue that their due process rights have been violated because the workers' compensation remedy is inadequate to compensate them for their alleged injuries. It has always been recognized that workers' compensation generally provides less lucrative compensation than might be provided by common law tort recovery. The advantage to the employee, however, is the certainty of recovery. *See, e.g., Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972) (workmen's compensation laws represent outgrowths and modifications of basic tort law and offer a more certain, though generally less remunerative, compensation). Nevertheless, this aspect of the compensation laws does not violate due process. In fact, it is not clear that the Due Process

Clause requires a legislatively enacted compensation scheme to either duplicate the recovery at common law or provide a reasonable substitute remedy. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 (1978). The Constitution does not forbid the creation of new rights or the abolition of old ones to attain a permissible legislative object, even if "otherwise settled expectations" may be upset as a result. *Id.* at n.32 (citations omitted). Indeed, statutes limiting liability are relatively commonplace and are consistently enforced by the courts. *Id.* Nebraska's Workers' Compensation Act, which does provide a substitute remedy in lieu of common law recovery, clearly meets the requirements of due process.

**B. ALLEGATIONS OF INTENTIONAL  
TORTIOUS CONDUCT DO NOT ALTER THE  
CONSTITUTIONAL VALIDITY OF  
NEBRASKA'S WORKERS' COMPENSATION  
ACT.**

Could does not concede that Petitioners' allegations establish intentional injuries or that any Petitioners were ever intentionally injured in their employment. Further, the record in this case does not support Petitioners' allegations of intentional injury. Accepting their allegations as true, however, solely for the sake of argument, the Petition for Writ of Certiorari should still be denied because no due process violation exists.

Exclusiveness is no less constitutional because the employer conduct immunized is alleged to be intentionally tortious or culpably negligent. 2A A. Larson, *The Law of Workmen's Compensation* § 65.20 at 12-20 (1988) (footnotes omitted). This is because the fact remains,

whether the employer's conduct is negligent or "intentional," that the employee has no vested property interest in any remedy under the common law. Therefore, there can be no due process violation under the case law discussed in the preceding section. Further, the employee is not left without a remedy; rather, the right to recover at common law is replaced with the statutory benefits under workers' compensation. *New York Central R.R.*, 243 U.S. at 201-02.

In *Parker v. Energy Development Co.*, 691 P.2d 981 (Wyo. 1984), an employee who had been injured in a mine sued his employer alleging culpable negligence and intentional tortious injury. The court upheld the exclusivity provision against constitutional attack, stating:

[T]he employer of the injured or deceased employee who is contributing to the compensation fund in behalf of the worker's account is absolutely immune from all common-law tort remedies arising out of the injury to or death of the employee - including causes of action for intentional tort or culpable negligence.

691 P.2d at 985 (citation omitted).

The Wyoming Act is similar to the Nebraska Act in that an employee who is guilty of culpable negligence (or intentionally bringing about his own or a co-employee's injury) is barred from benefitting under the Act. The plaintiff in *Parker* argued that it was an unequal application of the law to not bar the employer from the protection of the Act when the employer acts culpably. The court rejected the argument, citing a reasonable basis for the distinction:



It is the employer who contributes to the fund and it is the employer's contributions which fund payment to workers for those injuries not occasioned by the employer's fault or negligence. In return for that contribution, the employer is granted immunity from suit. Neither the injured employee nor the co-employee contribute to the fund. A rational basis thus exists for treating the employer differently from his employees with respect to the extent of immunity.

*Id.* at 987-88.

The Kansas Act was similarly upheld against constitutional attack in *Rajala v. Doresky*, 661 P.2d 1251 (Kan. 1983), even in the face of intentional tort allegations. The plaintiff was injured when he was intentionally struck by a fellow employee. Plaintiff argued that the exclusive remedy provision violated the constitutional section guaranteeing all injured persons a "remedy by due course of law" and justice without delay. *Id.* at 1253. The court held that the Act's removal of certain common law remedies in exchange for a statutory substitute was constitutional and was a matter of public policy. *Id.* Where a statute is plain and unambiguous, the court was bound to "give effect to the intention of the legislature rather than determine what the law should or should not be." *Id.* at 1254. It was not the court's prerogative to modify the legislative determination by judicially carving out an exception for intentional torts. *Id.*

In the area of workers' compensation, judicially created exceptions to the Act can cause a severe economic imbalance. The court in *Griffin v. Georges, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979) stated:

[W]e must keep in mind that if employers are required not only to provide workers' compensation but also to defend tort actions of employees and to respond in damages for torts, there would be a subversion of the very purpose of the whole workmen's compensation scheme of spreading the risk of loss for injuries arising out of, and in the course of, covered employment so that, indirectly and ultimately, the general public bears the burden as a part of the cost of articles produced or services rendered, because there would be no way to spread the risk of tort liability.

589 S.W.2d at 27 (citation omitted). See also *VerBouwens v. Hamm Wood Prods.*, 334 N.W.2d 874, 877 (S.D. 1983) (recognizing the economic impact which can result from judicial "tampering" with the compensation act: "Just as workers' compensation insurance coverage is not an inconsiderable cost of doing business, so also would be the additional cost of insuring (if indeed such coverage is available) against the liability arising from the narrowing of the scope of the exclusive remedy provided by our workers' compensation statutes.").

The same principles apply in the instant case. While persons may disagree as to the wisdom of Nebraska's Act, such disagreement does not support a claim of unconstitutionality. The exclusive remedy set out in *Neb. Rev. Stat. § 48-111* (1988) and the lack of an exception for intentional torts does not violate due process under applicable legal tenets.

This Court, in *Mountain Timber Co.*, recognized the States' authority to enact compensation legislation in lieu of common law tort recovery.

The authority of the States to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. . . . "Neither the [fourteenth] amendment – broad and comprehensive as it is – nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity . . . ."

243 U.S. at 238 (citation omitted). *Accord Middleton*, 249 U.S. at 152 (1919) (there is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds).

In their Petition for Writ, Petitioners intimate that the Nebraska Supreme Court is in the minority in refusing to create an intentional tort exception to the exclusivity bar. The fact is that while several states have legislated an intentional tort exception<sup>4</sup>, very few courts have created a judicial exception. Several states' courts have expressly

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<sup>4</sup> E.g., *Ariz. Rev. Stat. Ann.* § 23-1022 A & B (1989); *Ky. Rev. Stat.* § 342.610(4) (1986); *Md. Ann. Code* art. 101, § 44 (1985); *Or. Rev. Stat.* § 656.156 (1989); *S.D. Codified Laws Ann.* § 62-3-2 (1978); *W. Va. Code* § 23-4-2 (1985) (all granting an employee the option to sue at common law for an employer's willful misconduct).

rejected the intentional tort exception.<sup>5</sup> In those few instances where courts have recognized an exception, the facts of the cases generally involved actual physical aggression by the employer or a co-employee.<sup>6</sup> Even if Nebraska was the only state which refused to recognize an intentional tort exception, this would not render Nebraska's law unconstitutional. See *Arizona Employers' Liability Cases*, 250 U.S. at 419, wherein this Court stated:

Novelty is not a constitutional objection, since under constitutional forms of government each State may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent is in the main confided to the several States; and it is to be presumed that their legislatures, being chosen by the people, understand and correctly appreciate their needs. The States are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

In light of legislative history, the Nebraska Supreme Court properly interpreted the Nebraska Workers' Compensation Act. In 1937, the Nebraska Legislature

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<sup>5</sup> E.g., *Ellis v. Rocky Mountain Empire Sports*, 43 Colo. App. 166, 602 P.2d 895, 898 (1979); *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 230-31 (Del. 1982); *Poyser v. Newman & Co., Inc.*, 522 A.2d 548, 551 (Pa. 1987); *Lopes v. G.T.E. Prods. Corp.*, 560 A.2d 949, 951 (R.I. 1989).

<sup>6</sup> E.g., *Mingachos v. CBS, Inc.*, 196 Conn. 91, 491 A.2d 368, 374 (1985); *Lavin v. Goldberg Bldg. Material Corp.*, 274 A.D. 690, 87 N.Y.S.2d 90, 92 (1949); *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233, 234 (1930).

amended the compensation act to include a list of certain occupational diseases. Significantly, included among those diseases were those "peculiar to the smelting, metal refining, or battery manufacturing industries, and which are contracted by workmen employed in said industries . . . ." 1937 Neb. Laws ch. 107, § 1, pp. 367-68. See also Committee Meeting on L.B. 90, Feb. 5, 1937 ("This amendment includes lead poisoning in battery manufacturing and work incident thereto.").

The Nebraska Supreme Court was also correct in holding that *Navracel v. Cudahy Packing Co.*, 109 Neb. 506, 191 N.W. 659 (1922), *reh'g denied*, 109 Neb. 512, 193 N.W. 768 (1923), *overruled on other grounds*, *Edelman v. Ralph Printing & Lithographing, Inc.*, 189 Neb. 763, 205 N.W.2d 340 (1973), "did not adopt a rule of law which carved out an exception to the coverage of the compensation act." 232 Neb. at 914, 443 N.W.2d at 596. *Navracel* held that an employee who had not formally rejected the coverage of the compensation act could not sue his employer at law for the employer's failure to guard certain machinery in violation of the factory act. 109 Neb. at 512, 191 N.W. at 661. *Navracel* did not, in its dictum referring to the dictum in *Adams v. Iten Biscuit Co.*, 63 Okla. 52, 162 P. 938 (1917), recognize an exception for intentional conduct such as that alleged by Petitioners.

The Nebraska Supreme Court's decision was based, in large part, on the historic trade-off between employers and employees and the economic balance created thereby. See 232 Neb. at 913-14, 443 N.W.2d at 595-96. Although the supreme court declined to create an intentional tort exception, it did not act "so arbitrarily, unreasonably, and unjustly as to render [its] action void." *Arizona*

*Employers'*, 250 U.S. at 427. All reasonable presumptions are in favor of the constitutionality of Nebraska's Workers' Compensation Act, and the burden of proving otherwise is on Petitioners. See *Mountain Timber Co.*, 243 U.S. at 237-38. The Petition for Writ of Certiorari fails to present either an important question of federal law which has not been decided by this Court, or a federal question which has been decided in conflict with applicable decisions of this Court. The Petition for Writ should therefore be denied.

### III.

#### THE INSTANT CASE IS CLEARLY DISTINGUISHABLE FROM *BARRETT V. ADAMS FRUIT CO.* AND THEREFORE SHOULD NOT BE GRANTED CERTIORARI IN CONJUNCTION WITH *BARRETT*.

In a letter to the Clerk of this Court dated December 8, 1989, Petitioners' counsel stated: "We believe the [*Abbott*] case should be treated as a companion case to *Adams Fruit Co. v. Barrett* No. 88-2035 in which the Court granted Certiorari on October 2, 1989, which also deals with the relationship between the exclusivity remedy provision of a state workers' compensation act and federal law."

*Barrett v. Adams Fruit Co.*, 867 F.2d 1305 (11th Cir.), cert. granted, 110 S. Ct. 49 (1989) was decided in March of 1989 by the Court of Appeals for the Eleventh Circuit. The case involves a group of farm workers who were injured in an accident while being transported in a van owned by their employer. The plaintiffs received workers' compensation benefits under Florida law and

then sued their employer under the federal Migrant and Seasonal Agricultural Worker Protection Act. The district court had found the suit barred by the exclusive remedy provision of the compensation act, but the circuit court reversed this holding.

The constitutional issue presented is whether the state statute (i.e., the workers' compensation law) may be preempted by the federal, agricultural worker, law, and thereby be rendered invalid under the Supremacy Clause. 867 F.2d at 1306. The instant case involves no conflict with a federal statute. The grant of certiorari in *Barrett* should not be extended to the instant case as the facts in the two cases are clearly distinguishable and present entirely different legal questions.

Furthermore, the Eleventh Circuit's holding in *Barrett* is in direct conflict with the Fourth Circuit's holding in *Roman v. Sunny Slope Farms, Inc.*, 817 F.2d 1116 (4th Cir.), *cert. denied*, 484 U.S. 855 (1987). *Roman* also involved receipt of workers' compensation benefits and a subsequent attempt to recover under the Agricultural Worker Act. Unlike the Eleventh Circuit, the Court of Appeals for the Fourth Circuit held the subsequent action barred by the exclusive remedy doctrine.

Under Supreme Court Rule 17.1(a), it is expressly stated that this Court will consider granting certiorari when "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." The conflicting holdings of the Fourth and Eleventh Circuits on an identical issue therefore presented sufficient grounds for granting certiorari.

In the instant case, on the other hand, the Nebraska Supreme Court's decision is well-supported by Nebraska's legislative compensation scheme, which legislation does not deprive Petitioners of a property right without due process. It would be inappropriate, therefore, to grant certiorari in the instant case.

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## CONCLUSION

Beginning in 1917, this Court has consistently upheld the constitutionality of workers' compensation legislation against due process attacks. Whereas the early arguments against the acts' constitutionality were advanced by the employers, we have come full circle with the arguments now being advanced by the employees.

Regardless of the party asserting the argument, workers' compensation acts do not violate due process. In exchange for the opportunity to pursue a common law remedy, employees are assured of a certain, less expensive and generally quicker means of recovery through workers' compensation legislation. This is the *quid pro quo* which supports the validity of the legislation.

The facts in the instant case do not present intentional injuries. Nevertheless, workers' compensation is no less constitutional if the injuries alleged are "intentionally" or culpably caused. Specifically, the Nebraska Supreme Court's reluctance to judicially create an intentional tort exception to the exclusive remedy provision is well-supported by the purpose of the State's compensation act and poses no constitutional infringement.



Based on Petitioners' failure to raise the constitutional issue at the trial level, or, in the alternative, their failure to present an important, undecided question of federal law, Gould respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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